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Nos. 82-1331 and 82-1352

**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1982

LOUISIANA PUBLIC SERVICE COMMISSION, et al.,
Petitioners,

v.

**FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,**
Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE;
BRIEF AMICUS CURIAE OF THE
MARYLAND OFFICE OF PEOPLE'S COUNSEL
IN SUPPORT OF THE
PETITIONS FOR WRIT OF CERTIORARI OF
THE LOUISIANA PUBLIC SERVICE COMMISSION,
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
THE PEOPLE OF THE STATE OF CALIFORNIA AND
THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

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The Maryland Office of People's Counsel (hereinafter "MPC") respectfully moves for leave to file the attached brief *amicus curiae* in support of the request of the Petitioners, Louisiana Public Service Commission (Case No. 82-1331) and National Association of Regulatory Commissioners, *et al.* (Case No. 1352) that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit. The consent of counsel for the Petitioners to the filing of a brief *amicus curiae* by

MPC has been obtained. The consent of respondents Federal Communications Commission and the United States of America to the filing of a brief *amicus curiae* by MPC has also been obtained.

The interest of MPC in this matter results from a statutory obligation to represent the interests of Maryland's residential ratepayers before federal and state agencies and courts (Article 78, § 15 Md. Ann. Code 1982). The effect of the decision of the United States Court of Appeals for the District of Columbia Circuit affirming the order of the Federal Communications Commission contested by Petitioners is to curtail the ability of the states to secure for residential users quality telephone service at reasonable rates. Accordingly, MPC is uniquely qualified to represent the interests of Maryland's residential ratepayers who are not parties to this action but whose interests will be directly affected by the ultimate resolution of the issues presented herein.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE
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INTEREST OF THE
MARYLAND OFFICE OF PEOPLE'S COUNSEL

The Maryland Office of People's Counsel is an agency of the State of Maryland created to protect the interests of Maryland's residential and noncommercial users of telephones and other regulated services in proceedings before federal and state agencies and courts. Art. 78 § 15 Md. Ann. Code (1982). The Federal Communications Commission decision in *Second Computer Inquiry*¹ which was

¹ In *The Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations* (Docket No. 20828), 61 FCC 2d 103 (1976), 64 FCC 2d 771 (1977), 72 FCC 2d 358 (1979), 77 FCC 2d 384 (1980), 84 FCC 2d 50 (1980), 88 FCC 2d 512 (1981).

affirmed by the United States Court of Appeals for the District of Columbia Circuit, *Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) dramatically alters the structure of the telecommunications industry and the framework for regulating that industry. In addition to changing the relationship between Maryland's residential customers and their telephone company, the *Second Computer Inquiry* decision also deprives Maryland residential customers of certain regulatory protections instituted by their State government. Specifically, this FCC decision preempts state regulatory authority over customer premises equipment, i.e., the telephone instrument itself. Accordingly, MPC is vitally interested in the disposition of the pending Petitions which contend that FCC preemption of state regulatory authority in this case is inconsistent with the FCC's statutory authority and the clear intent of Congress.

SUMMARY OF ARGUMENT

Petitioners Louisiana Public Service Commission *et al.* have identified a novel federal question whose answer profoundly affects the Congressionally intended apportionment of regulatory authority over the telecommunications industry between the individual states and the Federal Communications Commission (hereinafter "FCC"). MPC supports the position of the Petitioners that the FCC does not possess the requisite legal authority to change the policy objectives of the Communications Act and to preempt state regulation of customer premises equipment.

Because of the clear Congressional intent to reserve for the states autonomous regulation of intrastate telecommunications, the potential impediment to promulgating the FCC policy presented by continued state regulation of customer premises equipment cannot be interpreted as an obstruction which must give way to federal prerogatives as the FCC has argued. Instead, independent state regulation

must be understood as the embodiment of a federal policy which was unambiguously articulated and implemented by Congress. Accordingly, MPC respectfully urges this Honorable Court to grant the Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit and reaffirm the longstanding principle that a federal agency may not preempt state regulatory authority without a clear Congressional intent that it do so.

ARGUMENT

THE FCC MAY NOT PREEMPT STATE RATEMAKING AUTHORITY WITHOUT A CLEAR CONGRESSIONAL MANDATE.

The Supremacy Clause (Art. VI, cl.2) of the Constitution of the United States of America which establishes superior federal jurisdiction in the field of commerce, has been held to extend Congressional power to intrastate activities which so affect commerce that federal regulation of those activities is appropriate. *U.S. v. Darby*, 312 U.S. 100 (1941); *Cloverleaf Butter Company v. Patterson*, 315 U.S. 148 (1942); *Wickard v. Filburn*, 317 U.S. 111 (1942). However, this sweeping authority may not be cavalierly or injudiciously invoked by administrative fiat or extrapolated from ambiguous congressional silence. Instead, the courts approve this broadest of intrusions upon state regulatory authority only in the clearest of cases:

"The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons — either that the nature of the regulated subject matter permits *no other conclusion*, or that the Congress has *unmistakably so ordained*. *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963). (emphasis added)

Rate regulation of the interstate telephone service is vested in the Federal Communications Commission pur-

suant to the 1934 Communications Act, 47 U.S.C. §§ 151 *et seq.* However, it is well established that the states retain exclusive jurisdiction over rates for intrastate telephone service by the unambiguous, explicit language of the 1934 Act which created the FCC and delineated the bounds of its authority. *Northwestern Bell Telephone Co. v. Nebraska State Railway Commission*, 297 U.S. 471 (1936).

The Communications Act provides the FCC with responsibility for the development of accounting systems and rules and to provide the FCC with ratemaking jurisdiction only for interstate service. The Act explicitly reserves intrastate ratemaking to the states: ". . . nothing in this Act shall be construed to apply or give the FCC jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, . . ." 47 U.S.C. § 152(b).

In 1934 when the Act was passed, Congress anticipated consolidation or merger of telephone companies and recognized that such reorganization could cloud once clear divisions between intrastate and interstate service. Here too, the Congressional intent to reserve intrastate ratemaking to the states was expressly set out. Section 221 of the Act, 47 U.S.C. § 221, deals with merger and consolidation. In subsection (a) the Act authorized and required the FCC to certify the consolidation, control or merger but, limited the scope of FCC authority by explicitly protecting state jurisdiction: "Nothing in this subsection shall be construed as in anywise limiting or restricting the powers of the several States to control and regulate telephone companies." 47 U.S.C. § 221(a). Furthermore, language parallel to that in § 152(b), was added as a separate subsection, 47 U.S.C. § 221(b), specifically reserving intrastate ratemaking to the states where metropolitan exchanges crossed state lines. Thus, Congress was very careful to protect the States' ratemaking jurisdiction with

explicit language in the general reservation section, 47 U.S.C. § 152(b), and in the other ratemaking sections, 47 U.S.C. § 221(a) and § 221(b) where silence might otherwise have caused confusion.

Based upon an aggressive interpretation of its own authority the FCC seeks to implement policy objectives adopted in its *Second Computer Inquiry*, *supra*, by preempting state regulation without regard for the clear Congressional protections against such intrusions. In affirming this contested FCC action, the United States Court of Appeals for the District of Columbia Circuit has ignored its own, previously stated reluctance to defer to FCC interpretations of the Communications Act which expand the scope of its own authority notwithstanding statutory interpretation principles which would normally accord such deference:

"While we do not quarrel with the general proposition, which has been affirmed several times in the courts, [footnote omitted] we hasten to add it is not a license to construe statutory language in any manner whatever, to conjure up powers with no clear antecedents in statute or judicial construction nor to ignore explicit statutory limitations on Commission authority." *NARUC v. FCC*, 533 F.2d 601, 618 (D.C. Cir. 1976).

Clearly, FCC preemption of state regulatory authority concerning customer premises equipment has not been unmistakably ordained by Congress. Quite the contrary, state regulatory authority in this matter has been explicitly protected by Congress as an integral element of the national framework for telecommunications regulation.

CONCLUSION

If permitted to stand the decision of the United States Court of Appeals for the District of Columbia Circuit affirming FCC preemption of state regulatory authority over customer premises equipment — unsupported by any Congressional mandate — will profoundly compromise the states' role in the national telecommunications regulatory framework as envisioned by Congress. Therefore, the Maryland Office of People's Counsel respectfully requests that this Court issue the requested writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

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